INDEX

	PAGE
Charter Statement	1
Argument	5

APPENDIX

Stipulation	19
Opinion in Bryan vs. Becket et al	20
Opinion in Bryans Appeal	21

COUNTER STATEMENT.

The controversy here is as to the undivided one-half of seven acres of land in the city of Pittsburgh. The title to the land was in James Bryar (the husband of Jane Bryar) and S. B. McElroy. McElroy conveyed his undivided one-half to James Bryar by deed, dated 10th June, 1856, and this deed was promptly recorded. James Bryar was adjudged a bankrupt on 8th January, 1877, and the land appeared in his schedules as belonging to him. Three months after his adjudication Jane Bryar, his wife, set up a claim that the name of her husband, as grantee in the McElroy deed made twenty-one years before, was a mistake, and that it should have been made to her. The first intimation of this was in a bill filed on that date by her in the District Court against her husband and his assignee, in which she asked that the assignee be restrained from exercising control over her land, or selling the same (Record 3, 4). Something over two years from that date, viz, 25th June, 1879, she was allowed to amend her prayers, so as to ask for a conveyance to her of the undivided one-half of the land.

The land was sold at assignee's sale as the property of James Bryar on the 4th May, 1878, and purchased by Thomas Campbell, the appellee here. Finding the bill was being proceeded with and testimony being taken, Campbell intervened on 15th August, 1878. As already stated, Mrs. Bryar was allowed on 25th June, 1879, to amend her prayers so as to ask for a conveyance of the

land. This amendment was without notice, and the next day a decree was entered directing Campbell to convey to Mrs. Bryar the undivided one-half of the land.

On 30th June, 1879, Campbell appealed to the Circuit Court. His bond for costs was filed in the District Court on that day, and on 30th August, 1879, his petition for appeal, the decree, the docket entries in the District Court and his bond on appeal were certified into the Circuit Court.

The particular attention of the Court is now requested to certain additional facts.

James Bryar, being the owner, as per the record, of the whole seven acres, had on 1st Oct., 1874, mortgaged the the same to E. R. James, to secure a debt of $2,000, and to Thos. McClintock to secure another debt of $3,000. Bryar defaulted in the payment of these mortgages. Writs of Scire Facias were issued on both. A Levari Facias was issued on the James Mortgage, and the property was sold thereon to W. B. Rodgers, and a Sheriff's deed made to him on 20th September, 1879. Mr. Rodgers, shortly previous to the sale, had purchased the mortgages to protect Campbell, and at the Sheriff's Sale purchased for him. Shortly after the sale Rodgers conveyed the property to Campbell, and the latter went into possession and put a tenant on the premises. *It will be observed that this title was obtained by Campbell after the decree of the District Court and after the appeal.*

Within four months after the Sheriff's Sale viz : January, 1880, Mrs. Bryar brought an Ejectment in the Court of Common Pleas No. 1 of Allegheny County (where the land is situated) against Thos. Campbell, Becket, his tenent, and W. B. Rodgers to recover the same undivided interest in the same land as referred to in her bill in he District Court.

In that ejectment Mrs. Bryar set up in her abstract of title and proofs the same equitable title which was the foundation of her bill in the District Court. Campbell, in his abstract and proofs claimed to have taken the title of the mortgagee, and as the mortgagee had no notice of Mrs. Bryar's claim, therefore his title under the Sheriff's Sale was free from any equity on the part of Mrs. Bryar. That case resulted in a verdict for the defendants. Mrs. Bryar then took an appeal to the Supreme Court of Pennsylvania and the judgment was affirmed by that Court in November, 1881, in an opinion, a copy of which will be found in the Appendix to this book.

This decision of the Supreme Court was acquiesced in, and no move was made in the Circuit Court for over fourteen years. But in December, 1895, a motion was made in the Circuit Court on behalf of Appellants for an order decreeing the appeal deserted for the reasons that Campbell had "failed to bring up the record from the said District Court, pay the entry costs in this Court, or to prosecute their appeal to the next term of this Court." (Record 28).

Campbell filed an answer setting out that he had acquired a title to the land after the decree, and the proceedings in the State Courts as stated above, and assigning those facts as his reason for not prosecuting his appeal, but that if necessary, asking leave to take testimony as to the facts. The Court allowed Campbell to take this testimony.

By stipulation filed in the Circuit Court on 28th January, 1897, it was agreed that a substitution, previously made of the heirs of Jane Bryar, as plaintiffs, be taken and considered as a Bill of Revivor; that Campbell's answer to the motion to decree the appeal deserted be taken as a cross bill, and that the case be heard upon the record before the Court (including the testi-

mony taken in the Circuit Court). This stipulation is not printed in the Record, but is printed in the Appendix to this book and appears in substance in the docket entries in this Record, p. 1-2. The Court after argument, entered a decree reversing the decree in the District Court and dismissing the bill.

By agreement of Counsel the paper books on both sides in the ejectment case were to be used in the Circuit Court, and for the abstracts of title, testimony points and all other matters, reference was to be had to the paper books (see this Record p. 32-33). None of the contents of these paper books appear in this Record, but the books themselves will, if necessary be produced on the argument of this case.

ARGUMENT.

1. From the statement of the facts, as given in the Counter Statement, the Court will see why Campbell took no further proceedings in his appeal at the time.

In January, 1880, during the term of the Circuit Court next after the appeal, and within four months from the date of the decree, Mrs. Bryar brought her Ejectment against him in the State Court, claiming to recover the same interest in the same land, and by the same equitable title, as set forth in her bill. Compbell was compelled to defend in that jurisdiction. He had no option in the matter. He could not set up as a defense the pendancy of the Bill in Equity in the Circuit Court.

Smith vs. Lathrop, 44 Pa. 326.

Stanton vs. Embry, 93 U. S. 548-554 and cases there cited.

The case was tried and resulted in a verdict and judgment for Campbell. Mrs. Bryar then took an appeal to the Supreme Court of Pennsylvania and the judgment was affirmed by that Court in November, 1881. Bryar vs. Beckett et al., 13 Pgh. L. J. N. S. 12. (See opinion, Appendix, pp. 1 and 2 this book). From that time until Jany. 1896 (when the attempt was made to revive the proceeding in the Circuit Court) the judgment of the Supreme Court was considered as an end of all controversy. Mrs. Bryar lived for nine years after that judgment and she apparently never thought that she

could take Campbell into the State Court, and litigate with him there, and if successful there take the land from him, but if unsuccessful, fall back on the bill in equity, and by it, take the land. Nor did her heirs have any such thought for six years after her death.

In the meantime the property had been subdivided into lots, which have been sold over and over again, and improved by the purchasers in reliance upon the judgment of the Supreme Court of Pennsylvania.

Mrs. Bryar abandoned her bill when she went into the State Court. She could not vex Campbell with two suits for the same cause of action, prosecuted in two different jurisdictions at the same time. For some reason she chose to proceed in the State Court and continued there until she procured the final judgment of the highest Court of the State. No one can doubt that Campbell, being pursued by Mrs. Bryar in the State Court, had at least good reason to suppose that Mrs Bryar had elected to desert her first suit. Therefore, his omission to take further action in the appeal in the Circuit Court was excusable.

Grigsby vs. Purcell, 99 U. S., 506.

And in any aspect of the case the Circuit Court did justice when the facts were properly brought before it by bill of revivor, cross bill and proofs, in concluding that Campbell should not be allowed to suffer.

Moreover, abandonment of the bill by Mrs. Bryar is to be conclusively presumed as against her and her heirs by reason of her and their long acquiescence and laches. Campbell was in possession. His title was declared by the Supreme Court to be a paramount title, and she or her heirs never made a move to assert any claim under the decree for over fourteen years.

Waring Bros. & Co. vs. Pa. R. R. Co., 176 Pa., 172.
Biddle vs. Bank, 109 Pa., 349.

But it is said now that the State Court did not have jurisdiction. The State Courts have jurisdiction in actions of ejectment. If the position on the other side be that the State Courts could not try this particular case, the answer is, where the objection is to the power of the court to try the particular case and not to its power to try cases of the same general character the objection may be waived.

Fennell vs. Guffy, 155 Pa., 38.

Again, under Campbell's defense as set up in the ejectment, the case turned on the after acquired title, under the sheriff's sale on the James mortgage. We cannot conceive how either party could compel the other to litigate that question in the United States Courts under the bill in equity.

It cannot be possible that Appellants argue seriously when they say that the decree in equity was res judicata, and therefore the State Courts had no jurisdiction. Conceding, for argument, to the decree, all the efficacy claimed—that is, that it had the same effect as a judgment at law on an equitable title—it is a sufficient answer to say that it was never heard of; that when there was such a decree that the parties could *never* litigate again in relation to the subject matter, on an after acquired title, not involved in the former case.

Again it is argued, that the decision of the Supreme Court of Pennsylvania was wrong. In Forsyth vs. Hammond, 166 U. S. 517, this Court said: "The questions both of error and jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any

other tribunal to collaterly deny the validity thereof? Does not the principle of res judicata apply in all its force? * * The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other form."

There is no question here as to a resulting trust, nor as to subrogation. The simple question upon which the decision in the ejectment case of Bryar vs. Beckett et al. was based, was as to whether Campbell was or was not entitled to the rights of a bona fide purchaser under the sale on the James Mortgage. As stated, there were two mortgages on the land, both made by James Bryar—one to E. R James and the other to McClintock. It was shown on the trial of the ejectment, and has always been conceded, that these mortgagees had no notice of Mrs. Bryar's equity.

In Bracken vs. Miller, 4 W. &. S., 102, Judge Grier, then sitting in the District Court of Allegheny county, was affirmed, the Court saying, "The rule being well settled that if the first purchaser had no notice, a second purchaser from him holds the land discharged of a trust, even though such second purchaser had notice of it. Harrison vs. Forth (Prec. Ch. 51), Brandlyn vs. Ord (1 Atk., 571), Sweet vs. Southcote (2 Bro. Rep., 66), Fonb Eq. 147."

A mortgagee is a purchaser within the recording acts. Ernest vs. Culbertson, 6 Weekly Notes Cases, 199.

Campbell bought at assignee's sale "subject to the payment of said mortgages," or "subject to the first mortgages."

This did not require him to pay these mortgages. There was no personal duty or obligation of payment.

It was discretionary with him whether he should stand on the equity of redemption which he had purchased, or go farther and perfect his equity into a legal title. This is what is decided by the Supreme Court of Pennsylvania in the ejectment of Bryar vs. Beckett, et al., *supra.*

Campbell's covenant was again before the Supreme Court of Pennsylvania in Bryar's Appeal, 111 Pa., 81, which was a case where Mrs. Bryar after the determination of her ejectment, filed her bill for dower in the same land. A copy of the opinion in that case will be found in appendix to this book. The Court there says, "By the purchase at the assignee's sale Campbell obtained Bryar's equity of redemption, and as respects him nothing more. He bought the land subject to the mortgages, and there is no way that he could hold the land under that purchase and compel Bryar to pay the whole or a part of the debt. His bid was in addition to the debts secured by the mortgages. He contracted no personal liability, and was at liberty to suffer the mortgagees to cause the land to be sold at judicial sale, in which case he could have bought it himself." And again, "Campbell had an interest in preserving the mortgages until after foreclosure and sale, for the purchaser at such sale would take as good title as the mortgagor appeared to have. If the mortgagee had no knowledge of an adverse title he had a right to perfect his title if he could, but he was not bound to buy the property if another should bid a larger sum than he cared to pay. The question is not whether he could purchase the mortgage and use it to compel the debtor to pay it, but whether he can use it to protect himself against adverse claims which could not avail against the mortgagee or any one holding under him. At the Sheriff's Sale upon the judgment on the mortgage all persons were as free to bid as if there had been no sale by the Assignee, and the purchaser took title under the mortgagee. It was said by the late Chief Justice that Campbell, unless he expressly or by necessary impli-

cation agreed to pay the mortgages, had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them. Bryar, et ux. vs. Beckett, et al., 13 Pgh. L. J. N. S. 12."

All that Campbell contended for in the Circuit Court was that he should be allowed to bring before the Court all the facts in the case, and under the circumstances it was no more than justice that he should be allowed to do so. This the Circuit Court allowed him to do. The proofs in the District Court as well as those taken in the Circuit Court, are all upon this record. Those taken in the Circuit Court refer only to the facts which transpired after the decree and appeal were taken, and they were properly raised by the cross bill of Thomas Campbell, (see stipulation of 28th January, 1897, appendix). Thus that Court had before it every fact necessary to decide the case.

If the matter of defence arises after the cause is at issue, as if there has been a release or an award, that and similar defences are properly made by cross bill.

Story's Equity Pleading, Section 293.

The appeal, as in admiralty cases, carried the whole cause into the Circuit Court to be proceeded in there upon new pleadings and additional proofs if necessary or advisable. The suit might have been brought in the Circuit Court originally, Revised Statutes, Sec. 4979. In addition, the Circuit Courts have a general superintendence and jurisdiction of all cases arising in the District Court when sitting as a Court of Bankruptcy, and except when special provision is otherwise made may, upon bill, petition or other process of any party aggrieved hear and determine the same as in a Court of Equity. Sec. 4986.

II. Appellants controvert the opinion of the Court of Appeals as to there being at least a doubt as to the juris-

diction of the District Court. It was not necessary for the decision of the case for that Court to go farther than the suggestion.

Our position on this point is this: Whatever may have been the rights of Mrs. Bryar as against the Assignee, or those of the Assignee as against Mrs. Bryar, the fact is that the Assignee by order of the District Court sold the right, title and interest of James Bryar in the land to Thos. Campbell, and that sale was approved by the Court and deed made. When this was done the land passed out of the jurisdiction of the District Court. It might have distributed the proceeds as it saw fit under the law, but that was all. Whether Mrs. Bryar's alleged interest passed by that sale or not, was not to be determined by that Court, but by the State Courts in a proceeding at law. The parties were citizens of Pennsylvania. The law afforded a plain, adequate and complete remedy, by which possession could be obtained. The United States Courts will not entertain an Ejectment Bill. Killian et. al. vs. Ebbinghams Trustees, 110 U. S. 568 Fussell vs. Gregg 113 U. S. 550. Nor will the Courts of Pennsylvania. Long's Appeal 92 Pa. 171. Richard's Appeal 100 Pa. 51.

True, Campbell intervened. He intervened in the bill as it was, and for the purpose of putting before the Court the fact of his purchase as a reason for no further proceedings, and dismissing the bill. He certainly had no reason to suppose that because he intervened he was to be held for any and everything that the Plaintiff might thereafter conclude to ask for and the Court grant, and particularly that he thereby agreed that the bill might be turned into an ejectment bill, by which he was to lose his land, and be compelled also *to make a deed or deeds therefor to Jane Bryar "or whom she should appoint."* Besides, if the Court did not have jurisdiction, his consent, if there was any, would not stand in the way of his

objecting, at any stage of the proceedings, and it would be proper for the Court itself to throw out the bill even when there was no demurrer or objection (Appeal of Pittsburg & Allegheny Drove Yard Co. 123 Pa. 250), because if for no other reason such bill is in the teeth of the 16th Section of the Judicial Act of 1789, which provides "that suits in equity shall not be sustained in either of the Courts of the United States in any case where plain, adequate and complete remedy can be had at law."

Parker vs. Winnipiseogee, etc. 2nd Black 55.

III. Appellants *now* claim that for certain reasons the appeal was not properly in the Circuit Court. These reasons are purely technical and are that the appeal was allowed too late, notice not given to the Clerk of District Court or to Jane Bryar, and the appeal not entered at the proper term of Circuit Court and record not brought into the Circuit Court.

If either of the positions argued above be correct it affords a complete answer to the appellants' contention now under consideration. Besides, no matter if all that the appellants claim on this point be true, it is an after thought and without merit now. The reason is this: The Circuit Court had jurisdiction on appeal and also supervisory powers over the District Court sitting in Bankruptcy. (Revised Statutes, Section 4979.)

When these appellants came into the Circuit Court it was with the declaration that "an appeal was *duly* allowed," but asking that the appeal be dismissed because of the failure to bring up the record, pay the entry costs and prosecute the appeal to the next court, and asked for *a decree of the Circuit Court declaring the appeal deserted and affirming the decree of the District Court.* (See record, p. 28). They admitted that the case was properly in the court by appeal, and that the power of the Circuit

Court was plenary. Next, by stipulation of 28th January, 1897, printed in full in appendix to this book, and given in substance in the docket entries (see Record 1, 2), they agreed that the substitution of the heirs of Jane Bryar be taken and considered as a regular bill of revivor; that Campbell's answer (Record 28, 29) be taken as a cross bill, and the case heard upon the record before the court, which record contained the testimony taken in District and Circuit Courts.

How is it possible for appellants to now deny the jurisdiction or allege that the case was not legally in the Circuit Court (whichever be their position) when they declared that the appeal was duly allowed, and then agreed that a bill of revivor and cross bill should be filed in the Circuit Court? How can they, after the case has been heard and decided upon the merits, deny the record upon which they agreed that the case be heard and decided?

But to take up the argument as made by Appelants'. Appeals are allowed by Section 4980 Revised Statutes, from the District to the Circuit Court in equity, when the amount in controversy exceeds five hundred dollars. Section 4981 provides: "No appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from, nor unless the appellant at the time of claiming the same, shall give bond in the manner required in cases of appeals in suits in Equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such appeals."

Section 4982 provides: "Such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same."

The decree was entered 26th June, 1879. On 30th June, 1879, a bond for costs on appeal to the Circuit Court was filed in the District Court. It seems to be true that no order of Court was made allowing the appeal until 16th July, 1879, but one was made at that time. It does not seem to us that there was any necessity for any allowance of appeal by the Circuit Court under the statue, certainly that it was not necessary that such allowance should be within ten days. The appeal is to be *claimed* and notice given within ten days, and bond to be given at the time of claims. Appeals are of right when the amount exceeds five hundred dollars. Here, the "bond for costs on appeal to Circuit Court" was filed 30th June, 1879. This may well be taken as a claim for what is a matter of right and a sufficient compliance with the Act. If filed with the Clerk of the District Court, it is apparent that that is notice to him and notice to both the Clerk and Mrs. Bryar is now presumed because of Appellants' motion of December, 1895, which does not allege that notice was not given either to the clerk or Mrs. Bryar.

Section 4982 provides that "such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of *claiming* the same."

The next term began 2nd Monday November, 1879, and continued to 2nd Monday May, 1880. The Clerk of the District Court certified the decree, petition, allowance of appeal, copy of docket entries and bond for costs to the Circuit Court, where they were filed 30th August, 1879 (Record 1). During the next term, viz: January

1880, Mrs. Bryar elected to proceed in the State Court and brought her ejectment.

Nor are appellants in any better position if we assume, for the sake of the argument, that the appeal was under the general procedure in equity.

Section 631 of Revised Statutes gives an appeal from all final decrees of a District Court in Equity, where the amount in dispute exceeds fifty dollars, exclusive of costs; and

Section 632 provides, "in case of an appeal, as provided by the preceding section, copies of the proofs and of such entries and papers on file as may be necessary on hearing of the appeal *may* be certified up to the Appellate Court."

The language of this section is an answer to the contention under consideration.

The provisions of the Revised Statutes as to appeals to the Supreme Court are radically different from those as regards appeals to the Circuit Court. As quoted, in appeals to the Circuit Court, copies of the proofs, entries and papers *may* be certified.

But as regards appeals to the Supreme Court the requirements are different and mandatory.

Section 698 reads as follows: "Upon the appeal of any cause in equity * * a transcript of the record as directed by law to be made, and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court."

Section 997 provides that "There shall be annexed to and returned with any writ of error for the removal of a cause at the day and place therein mentioned, an authen-

ticated transcript of the record, an assignment of errors and a prayer for reversal with a citation to the adverse party," and

Section 1012 provides that "Appeals from the Circuit Courts and district courts acting as Circuit Courts, and district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in case of writs of error."

Again: In cases of appeals to the Supreme Court the rule that a copy of the record must be filed within the term to which the appeal is returnable is subject to exceptions, and upon sufficient excuse shown the Court will retain the case. (Grigsby vs. Purcell, 99 U. S. 506–507.) The Court there said: "The real objection is not that this Court has no jurisdiction, but that the plaintiff in error, or appellant, as the case may be, has failed to duly prosecute his suit."

In this case there was ample excuse for Campbell's apparent failure caused by the action of Jane Bryar. If the Supreme Court, under its statutes, can relieve an appellant, the Circuit Court in this case had a right under its statutes to do as it did, and the case is then one of the exercise of a judicial discretion, which is not reviewable.

W. B. RODGERS,

Counsel for Appellee.